



**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1145**

**[Doc. No. AMS-DA-14-0018]**

**Extension of Dairy Forward Pricing Program**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule extends the Dairy Forward Pricing Program in accordance with the Agricultural Act of 2014 (2014 Farm Bill). The Dairy Forward Pricing Program was first authorized in section 1502 of the Food, Conservation and Energy Act of 2008. The program allows handlers regulated under the Federal milk marketing order program to pay producers and cooperative associations in accordance with the terms of a forward contract and not have to pay the minimum Federal order uniform price for milk. Establishing new contracts under the Dairy Forward Pricing Program has been prohibited since the expiration of the program on September 30, 2013. The 2014 Farm Bill (H.R. 2642) was signed into law on February 7, 2014, and extends the program to allow new contracts to be entered into until September 30, 2018. Any forward contract entered into up and until the September 30, 2018, deadline is subject to a

September 30, 2021, expiration date to meet the terms of the contract.

**DATES:** Effective [Insert date one day after date of publication in FEDERAL REGISTER]

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**SUPPLEMENTARY INFORMATION:** This final rule extends the Dairy Forward Pricing Program (DFPP) in accordance with the 2014 Farm Bill. The 2008 Food, Conservation and Energy Act (2008 Farm Bill) (Pub. L. 110-246) initially established the DFPP, which prohibited new forward contracts from being entered into after September 30, 2012, and no forward contracts entered into under the program extending beyond September 30, 2015 (7 U.S.C. 8772(e)). Passage of the "American Taxpayer Relief Act of 2012," (ATRA) (Pub. L. 112-240), signed into law on January 2, 2013, revised the program to allow new contracts to be entered into until September 30, 2013. New contracts have been prohibited since then.

The DFPP (7 U.S.C. 8772, 7 CFR 1145) allows handlers, under the Agricultural Marketing Agreement Act of 1937, (AMAA)

(7 U.S.C. 601-612 ), to pay producers or cooperative associations of producers a negotiated price, rather than the Federal order minimum blend price for producer milk if subject to conditions and terms of a forward contract, provided the volume of such milk does not exceed the handler's Class II, III, and IV utilization for the month on the order that regulates the milk. The program applies to producer milk regulated under Federal milk marketing orders that is not classified as Class I milk or milk otherwise intended for fluid use and that is in the current of interstate or foreign commerce or directly burdens, obstructs, or affects interstate or foreign commerce of Federally regulated milk. The Federal milk marketing order program consists of 10 Federal milk marketing orders (7 CFR parts 1001-1135).

This document provides notice that producers and cooperative associations of producers may now enter into forward price contracts under the DFPP through September 30, 2018, and that all terms of the forward contract must expire prior to September 30, 2021. All other provisions and requirements of the program as provided for in the final rule published October 31, 2008 (73 FR 64868) are still in effect.

## **Discussion of Rules Applicable to Program**

Section 1502 of the 2008 Farm Bill required the Secretary of Agriculture to establish a Dairy Forward Pricing Program. Authorization for this program expired on September 30, 2013, under the provisions of the ATRA. The DFPP allows a handler to forward contract for an amount of milk up to the volume of Class II, III, and IV milk pooled on the order by the handler under the AMAA, as amended, during a month and be exempt from the minimum Federal order blend price provisions for that milk. USDA, including Market Administrator personnel, does not determine the terms of forward contracts or enforce negotiated prices.

For producers who consider forward contracting as a risk-management tool, the "benchmark" price for milk is the minimum Federal order blend price that they would receive in the absence of a forward contract. It is reasonable to expect a producer to negotiate a forward contract that would approximate the minimum blend price plus applicable premiums averaged over the forward contract period. Over time, it is reasonable to expect to see forward contract prices paid to producers below the applicable minimum order blend price in some months and above the minimum order blend price in others.

Participation in the dairy forward pricing program is voluntary for dairy farmers, dairy farmer cooperatives, and handlers. Handlers may not require producer participation in a forward pricing program as a condition for accepting milk. A producer or cooperative association may continue to have its milk priced under the minimum payment provisions of the applicable milk order.

Any "handler" defined in 7 CFR §1000.9 is eligible to enter into a forward contract(s) with producers or cooperatives of producers. As defined in that section, "handler" includes not only the operator of a pool plant or nonpool plant, but also a broker serving as a handler as provided in §1000.9(b), a proprietary handler, and a cooperative association acting as a handler with respect to non-member milk delivered to a pool plant or diverted to a nonpool plant. Nothing in this regulation affects any contractual arrangements between a cooperative association and its members.

A handler's combined Class II, III, and IV producer milk utilization is defined in 7 CFR part 1145 as the handler's "eligible milk." In the case of a multi-plant handler, the handler's Class II, III, and IV producer milk utilization will be combined together for all of the handler's milk regulated under one milk marketing order. A handler will only be exempt

from paying the milk marketing order's minimum blend price on its volume of "eligible milk." If a handler enters into forward contracts for more than the eligible milk volume, ("over-contract" milk) the handler must notify the Market Administrator. If the handler fails to notify the Market Administrator of payment adjustments, the Market Administrator will prorate the over-contract milk to each producer and cooperative association having a contract with the handler.

Although handlers participating in the program will not be required to pay producers and cooperative associations the minimum uniform blend or component prices for contract milk, they must continue to account to the pool for all milk they receive at the respective milk marketing order's minimum class prices. In the case of milk received by a transfer from a cooperative association's pool plant, a handler may forward contract for all such transferred milk that is not used in Class I.

In many milk markets, nonpool plants regularly receive pooled milk from milk producers who are not members of a cooperative association. This milk is actually pooled by a pool plant operator or by a cooperative association through its deliveries to a pool plant. The non-member milk delivered to a nonpool plant is reported under the milk marketing order program

as producer milk diverted to a nonpool plant by the cooperative association on its monthly report of receipts and utilization to the Market Administrator. Alternatively, if a cooperative association is not involved in the transaction, such milk could be reported by a pool plant operator on its monthly report of receipts and utilization.

Many nonpool plant operators who receive non-member milk that is pooled through another handler issue checks to the nonpool plant's non-member producers. They submit their payrolls showing these payments to the Market Administrator. Nevertheless, these nonpool plant operators are not responsible under the milk marketing order program for paying their non-member producers the minimum Federal milk marketing order price; it is the handler (either the cooperative association or pool plant operator) that pools the milk for such nonpool plants that is responsible for an underpayment under the milk marketing order program.

Accordingly, only producer milk that is subject to forward contracting with a handler in compliance with the DFPP will be exempt from the order's minimum blend price provisions. In the case of non-member milk that is reported as producer milk by a cooperative association handler or pool plant operator, but pay rolled by a nonpool plant operator, the cooperative association

or pool plant operator, respectively, will be responsible for any underpayment to a non-member producer in the event that milk under contract becomes subject to minimum milk marketing order pricing (as in the case of over-contract milk). In this way, cooperative association handlers, pool plant operators, and nonpool plant operators may continue the arrangements that have evolved to pool milk under the Federal milk marketing order program and all will be permitted to participate in the forward contracting program.

Any handler participating in the program will continue to file all of the reports that are required under the applicable Federal milk marketing order. This includes reports of receipts and utilization of milk and monthly payroll reports that show all information required by the orders. The notable difference, however, for handlers participating in the DFPP are that they must also provide more detailed accounting in their monthly payroll reports to the Market Administrator and remittance information provided to participating producers (7 CFR 1\_\_\_\_.31, 1001.73(e), 1005.73(e), 1006.73(e), 1007.73(e), 1030.73(f), 1032.73(f), 1033.73(e), 1124.73(f), 1126.73(e), 1131.73(e)). In accordance with these provisions, the monthly payroll report of participating handlers is required to contain detailed accounting that distinguishes gross values paid for applicable



volumes of contract versus non-contract milk for each producer. Remittance information from participating handlers to participating producers must clearly distinguish gross values and volumes for contract versus non-contract milk. These distinctions avoid any questions concerning compliance with Federal order minimum price requirements for participant milk not under contract.

As with the DFPP, handlers participating in the Federal order program must submit to the Market Administrator a copy of each contract for which it claims exemption from the order's minimum blend pricing provisions. The contract must denote the pricing terms for contract milk. The contract must be signed prior to the first day of the first month for which the contract applies and must be received by the Market Administrator by the 15<sup>th</sup> day of that month. For the first month that the program is effective, contracts must be signed on or after the day on which the program becomes effective. For example, if the program becomes effective on February 15, contracts for March milk must be signed between February 15 and February 28, and copies must be received by the Market Administrator by March 15.

Each handler must give each contracting dairy farmer or cooperative association a disclosure statement informing them of the nature of the program and providing certain information that

should be considered before entering into a forward contract. It is important that producers clearly understand on what basis they are being paid for contract milk. The disclosure statement must be signed on the same date as the contract by the dairy farmer or cooperative association representative and will have to be returned by the handler to the Market Administrator together with the contract. The disclosure is less than one page long and can easily be incorporated into the body of the forward contract itself or can be handled as a supplement that may be attached to the forward contract. Any contract that is submitted to the Market Administrator without the disclosure statement will be considered to be invalid for the purpose of being exempt from the order's minimum pricing and will be returned to the handler.

Producers who are not members of a cooperative association should be aware that their milk weights and tests will continue to be handled in the same way by the Market Administrator even if they choose to enter into a forward contract which prices their milk on a different basis than the milk marketing order in which their milk is pooled. For example, if a producer in the Appalachian Order, which prices the milk of dairy farmers on the basis of skim milk and butterfat, enters into a contract that prices milk on the basis of protein, butterfat, other solids,

and somatic cell count, the producer will only receive data from the Market Administrator on the skim and butterfat components to compare against the buying handler's test data. If the producer wants to verify other component tests, they must do so at their own expense.

Handlers with forward contracts remain subject to all other milk marketing order provisions. Payments specified under a forward contract must be made on or before the same dates as order payments which they replace. If handlers paid producers under contract at different times than producers not under contract, disorderly conditions might occur. Payments for milk covered under forward contract are required to be made by the dates specified in §1145.2(e) of the regulations.

#### **Executive Order 12866 and Executive Order 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action has been designated as a "non-significant regulatory

action" under § 3(f) of Executive Order 12866 and therefore has not been reviewed by the Office of Management and Budget (OMB).

#### **Executive Order 12988**

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have a retroactive effect. There are no administrative procedures which must be exhausted prior to judicial challenge to the provisions of this rule.

#### **Executive Order 13175**

This rule has been reviewed for compliance with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." The review reveals that this rule will not have substantial and direct effects on Tribal Governments and will not have significant Tribal implications. AMS consulted with the USDA Office of Tribal Relations in development of this proposed rule and believes that it will not impact or have direct effects on Tribal governments and will not have significant Tribal implications. AMS continues to consult with the USDA Office of Tribal Relations to collaborate meaningfully to develop and strengthen departmental regulations.

#### **Regulatory Flexibility Act and Paperwork Reduction Act**

The legal basis for this rule was first set forth in the 2008 Farm Bill , which prohibited new forward contracts from

being entered into after September 30, 2012, and no forward contracts entered into under the program extending beyond September 30, 2015 (7 U.S.C. 8772(e)). Passage of the ATRA revised the program to allow new contracts to be entered into until September 30, 2013. The 2014 Farm Bill has again extended the program so that producers and cooperative associations of producers may now enter into forward price contracts under the DFPP through September 30, 2018, and that all terms of the forward contract must expire prior to September 30, 2021. All other provisions and requirements of the program as provided for in the final rule published October 31, 2008 (73 FR 64868) are still in effect.

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 - 612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities for the reasons stated herein. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a small business if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a small business if it has fewer than 500 employees.

For the purposes of determining which dairy farms are small businesses, the \$750,000 per year criterion was used to establish a production guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most small dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a large business even if the local plant has fewer than 500 employees.

During an average month in 2012, the milk of 40,750 dairy farmers was pooled throughout the Federal milk marketing order system. Of the total, an estimated 38,305 dairy farmers, or 94 percent, were considered small businesses. During the same time period, there was an average of 237 pool handlers per month with milk priced and pooled on a Federal milk marketing order. Of this total, approximately 126, or 53 percent, were considered small businesses.

AMS is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen

access to Government information and services, and for other purposes.

The reporting and recordkeeping requirements for this rule are minimal. Section 1601 of the 2014 Farm Bill provides that the extension of the Dairy Forward Pricing Program shall be made without regard to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). Although exempted, the requirements of the Paperwork Reduction Act were considered in developing the provisions of this rule. The provisions extending the Dairy Forward Pricing Program have been carefully reviewed and every effort has been made to minimize recordkeeping costs or requirements.

Any handler that enters into a forward contract with a producer or cooperative association of producers must have written proof of such an arrangement. To meet other requirements for participation in this program, a handler must submit a copy of each forward contract with a producer or cooperative association of producers to the market administrator of the order which regulates the milk. Submitting this information to the milk market administrator is estimated to take 5 minutes or less. The handler must attach a disclosure statement to each forward contract, or otherwise make such statement part of the contract. The disclosure statement must

be signed by each producer or cooperative representative entering into a forward contract. The disclosure statement explains that producers or cooperative associations of producers entering into forward contracts forfeit their rights to receive the minimum order price(s) for that portion of their milk that is subject to the contract for the duration of the contract period. Preparing the contract and attaching or including the disclosure statement is estimated to take 20 minutes or less per contract.

Any handler participating in the program will continue to file all of the reports that are required under the applicable Federal milk marketing order, as authorized under the AMAA. The information collection requirements contained in the Federal milk marketing order program have been previously approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 and have been assigned OMB Control Number 0581-0032. This includes reports of utilization of milk and monthly payroll reports that show information required by the orders. Taking into account the Dairy Forward Pricing Program, the monthly payroll report of each participating handler and the support statement sent from each participating handler to each participating producer must contain detailed accounting that distinguishes total rates used in making payment and volumes for



milk under forward contract. While the resulting changes in burden are exempt from the Paperwork Reduction Act, slight modifications to the currently approved "Handler's Report for Producer Payroll" form have been submitted to the OMB.

If a handler's contract milk exceeds the handler's eligible milk for any month in which the specified contract price(s) are below the order's minimum prices, the handler must designate which producer milk shall not be contract milk. Preparing this notification is estimated to take 5 minutes or less. If the handler does not designate the suppliers of the over-contracted milk, the market administrator shall prorate the over-contracted milk to each producer and cooperative association having a forward contract with the handler.

The primary sources of data used to complete these reports are routinely used in most business transactions. The additional reporting requirements required by this rule typically only require a minimal amount of data processing time, and the information collection and reporting burden is relatively small. Requiring the same reports for all handlers does not significantly disadvantage any handler that is smaller than the industry average.

USDA does not expect the forward contracting program to unduly burden small entities or impair their ability to compete

in the marketplace. In its simplest form, a forward contract between a milk buyer and a milk producer (or cooperative) is an agreement to sell a stated quantity of milk for a specified period at a stated price. Producers and handlers are able to "lock-in" prices, thereby minimizing risks associated with price and income volatility and enhancing their ability to obtain new or continued financing. By providing another tool to possibly reduce price risk, the program may aid small businesses in competing with larger entities that currently utilize futures and options markets, among other means, to reduce price volatility.

#### **Final Action**

In accordance with the 2014 Farm Bill, this final rule extends the Dairy Forward Pricing Program applicable under all Federal milk marketing orders. New contracts under the Program may be entered into until September 30, 2018. Any forward contract entered into up to and until the September 30, 2018, deadline is subject to a September 30, 2021, expiration date.

Subtitle F of Title I of the 2014 Farm Bill provides that the promulgation of these regulations shall be made without regard to the Paperwork Reduction Act (44 U.S.C. Chapter 35), the Statement of Policy of the Secretary of Agriculture,

effective July 24, 1971 (36 FR 13804)<sup>1</sup>, and the notice and comment provisions of section 553 of Title 5, United States Code.

These provisions are made final in this action, and for the same reasons good cause exists for making this rule effective one day after publication in the Federal Register. To do otherwise would be impracticable, unnecessary, and contrary to the public interest. (5 U.S.C. 553; 5 U.S.C. 808)

#### **List of Subjects in 7 CFR Part 1145**

Contract, Forward Contract, Forward Pricing, Milk

For the reasons set forth in the preamble, Title 7, chapter X, Part 1145 is amended as follows:

#### **PART 1145 - DAIRY FORWARD PRICING PROGRAM**

1. The authority citation for 7 CFR Part 1145 continues to read as follows:

Authority: 7 U.S.C. 8772.

2. Amend § 1145.2 by revising paragraph (b) to read as follows:

#### **§ 1145.2 Program.**

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<sup>1</sup> A Revocation of the Statement of Policy was published in the Federal Register on October 28, 2013 (78 FR 64194).

(b) No forward price contract may be entered into under the program after September 30, 2018, and no forward contract entered into under the program may extend beyond September 30, 2021.

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Dated: February 19, 2014

Rex A. Barnes  
Associate Administrator  
Agricultural Marketing Service

BILLING CODE 3410-02 P

[FR Doc. 2014-06189 Filed 03/20/2014 at 8:45 am; Publication  
Date: 03/21/2014]